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No. 07-1613

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In the Supreme Court of the United States

AHMAD AL-MARBU, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal court of appeals lacks jurisdiction under 8 U.S.C. 1252(a)(2)(B)(ii) to review an immigration judge's denial of an alien's request to continue removal proceedings.

2. Whether petitioner was denied due process in his removal hearing due to an allegedly defective transcript.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not published in the *Federal Reporter* but is reprinted in 248 Fed. Appx. 748. The decisions of the Board of Immigration Appeals (Pet. App. 9a-13a) and the immigration judge (Pet. App. 17a-22a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 2007. A petition for rehearing was denied on March 26, 2008 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on June 24, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 12541.

STATEMENT

1. a. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to ex-

pedite the removal of criminal and other illegal aliens from the United States. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. As relevant here, Congress amended the INA to limit judicial review of certain discretionary decisions of the Attorney General. As amended, the relevant section of the INA now provides that no court shall have jurisdiction to review any

> decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B)(ii). The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, subchapter II, which is codified at 8 U.S.C. 1151 through 1381 and pertains broadly to immigration matters. *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

b. The INA authorizes immigration judges (IJs) to conduct removal proceedings. 8 U.S.C. 1229a(a)(1). The Attorney General has promulgated regulations that provide rules of procedure for removal proceedings, in order to "assist in the expeditious, fair, and proper resolution of matters coming before Immigration Judges." 8 C.F.R. 1003.12. Under those rules of procedure, if an alien seeks a continuance of proceedings, "[t]he Immigration Judge may grant a motion for continuance for good cause shown." 8 C.F.R. 1003.29; see 8 C.F.R. 1240.6 ("After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause

shown, upon application by the respondent or the Service.").

"The grant of a continuance is within the IJs' broad discretion." *Zafar* v. *United States Att'y Gen.*, 461 F.3d 1357, 1362 (11th Cir. 2006). To obtain reversal by the Board of Immigration Appeals (BIA) of the denial of a continuance by an IJ, an alien must show, *inter alia*, "that the denial caused him actual prejudice and harm and materially affected the outcome of his case." *In re Villarreal-Zuniga*, 23 I. & N. Dec. 886, 891 (B.I.A. 2006) (internal quotation marks omitted).

c. The INA provides that the Attorney General may, in his discretion, adjust the status of an alien inspected and admitted into the United States to that of a lawful permanent resident. See 8 U.S.C. 1255. One way to become eligible for adjustment of status is through marriage to a United States citizen or lawful permanent resident. In that instance, the alien's spouse must first file a petition for an immigrant visa (Form I-130). 8 U.S.C. 1154(a); 8 C.F.R. 204.2. Then the alien must apply for adjustment of status. As relevant here, an alien is only eligible for adjustment of status if he is "eligible to receive an immigrant visa" *and* "an immigrant visa is immediately available to him at the time his application [for adjustment of status] is filed." 8 U.S.C. 1255(a). Even if an alien is eligible for adjustment of status, a favorable exercise of discretion to adjust his status is "a matter of grace, not right," *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978), and the applicant "has the burden of showing that discretion should be exercised in his favor," *In re Patel*, 17 I. & N. Dec. 597, 601 (B.I.A. 1980).

d. The INA provides that the Attorney General "may permit" certain removable aliens "voluntarily to depart the United States at [their] own expense" in lieu

of being removed. 8 U.S.C. 1229c(a)(1) and (b)(1). Aliens who are granted voluntary departure and comply with its terms avoid the period of inadmissibility that would otherwise result from departure following entry of an order of removal under 8 U.S.C. 1182(a)(9)(A), although other grounds of inadmissibility may still apply. See 8 C.F.R. 1241.7 ("an alien who departed before the expiration of [a] voluntary departure period * * * shall not be considered to [have been] deported or removed"). Voluntary departure also permits aliens "to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, [and] to avoid the stigma * * * associated with forced removals." *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004).

The INA and the Attorney General's regulations contain a number of provisions designed to ensure that aliens who have been granted the privilege of voluntary departure actually depart in a timely fashion. The INA strictly limits the period for which a grant of voluntary departure may last. For aliens who are granted that privilege at the conclusion of removal proceedings: "Permission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2); see 8 C.F.R. 1240.26(e). An alien permitted to depart voluntarily at the conclusion of removal proceedings "shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien will depart." 8 U.S.C. 1229c(b)(3); see 8 C.F.R. 1240.26(c)(3). An IJ who grants voluntary departure must "also enter an alternate order [of] removal." 8 C.F.R. 1240.26(d). If the alien does not depart within the time specified in the order granting voluntary departure, the alternate order of removal becomes final and

the alien becomes "ineligible, for a period of 10 years" to receive certain forms of discretionary relief, including adjustment of status. 8 U.S.C. 1229c(d)(1)(B); 8 C.F.R. 1240.26(a).

2. Petitioner, a native and citizen of Jordan, was admitted to the United States in 2000 as a non-immigrant visitor with authorization to remain in the United States for six months. Pet. App. 3a. Petitioner failed to depart the United States when required, *ibid.*, and he has remained in this country ever since.

In May 2001, petitioner married Brenda Freeman, a United States citizen. Pet. App. 3a. Shortly thereafter, Freeman filed an immediate relative petition for an immigrant visa (Form I-130) for petitioner. *Ibid.* In October 2001, however, Freeman sent a letter to the former Immigration and Nationalization Service (INS),[1] in which she stated that she wished to withdraw the petition. *Ibid.* Petitioner was placed in removal proceedings, and the INS charged him with being removable because he remained in the United States longer than permitted. *Id.* at 3a, 17a-18a; see 8 U.S.C. 1227(a)(1)(B). Freeman then filed an amended relative visa petition in November 2001. Pet. App. 4a.

In April 2002, petitioner first appeared before an IJ. He denied that he was removable, claiming that he had a pending application for a student (F-1) visa. Pet. App. 3a; AR1 201-203.[2] Petitioner acknowledged, however,

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[1] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice and its enforcement functions were transferred to the Department of Homeland Security (DHS), pursuant to Section 441 of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

[2] "AR1" refers to the volume of the Certified Administrative Record filed with the Seventh Circuit in No. 04-2055, and "AR2" refers to the

that his application for a student visa had never been approved. Pet. App. 3a; AR1 203.[3] The IJ found petitioner removable as charged. Pet. App. 3a-4a; AR1 207. Petitioner also claimed that he was eligible for adjustment of status based on his marriage to Freeman. Pet. App. 4a. The IJ noted, however, that petitioner was only eligible for adjustment of status if Freeman's amended relative visa petition had been approved, which it had not. AR1 207. Petitioner then requested that the proceedings be continued for six months to permit adjudication of that petition, and the IJ granted the request and set petitioner's next hearing for November 2002. Pet. App. 4a; AR1 209.

In October 2002, petitioner and Freeman divorced. Pet. App. 4a. About a month later, just before his next immigration hearing, petitioner married Ayan Mohamed, a lawful permanent resident of the United States. *Ibid.*[4] Mohamed filed a new relative visa petition (Form 1-130) for petitioner. *Ibid.* One week before his upcoming hearing, petitioner filed a motion for a continuance, in order to gain additional time for the INS to

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volume of the Certified Administrative Record file in No. 05-2824. See Pet. App. 2a n.1.

[3] DHS has informed this Office that its records indicate that petitioner filed an application to extend or change his nonimmigrant status in May 2001, but those records do not reveal whether the application was for a student visa or a different form of relief. In any event, DHS records reflect that additional information was requested from petitioner regarding the application in September 2001, and when no response from petitioner was received, his application was considered abandoned. As a result, a notice denying the application was sent to petitioner in January 2002. Petitioner therefore had no student visa application pending at the time the IJ ordered him removed.

[4] Mohamed was naturalized in November 2003. Pet. App. 5a.

adjudicate his new petition. *Ibid.* The IJ did not rule on that motion prior to the scheduled hearing. *Id.* at 5a.

At his November 2002 hearing, petitioner reiterated his request for a second continuance to allow consideration of his new visa petition. Pet. App. 5a; AR1 217. He explained that he was divorced from Freeman but wished to seek adjustment of status based on his new marriage. AR1 217-218. In the alternative, petitioner requested voluntary departure. AR1 219-220. The INS opposed the continuance motion on the ground that petitioner did not meet his burden of proving that his twelve-day-old marriage was *bona fide*. AR1 216-218.

The IJ issued an oral decision denying petitioner's motion for a continuance and granting his request for voluntary departure. Pet. App. 17a-22a. First, the IJ reiterated his previous determination that petitioner was removable as charged. *Id.* at 19a. The IJ then denied petitioner's request for a continuance, explaining that petitioner "does not have an I-130 approval for immediate relative and therefore is not eligible for adjustment of status." AR1 193; see Pet. App. 19a-21a. The IJ further explained that the fact that petitioner had a pending visa petition based on his second marriage was not sufficient to warrant a continuance, particularly because the BIA has held that an alien who marries after being placed in removal proceedings has the heavy burden of establishing that his marriage is *bona fide*. *Id.* at 19a-20a (citing *In re Arthur*, 20 I. & N. Dec. 475 (B.I.A. 1992) (declining to grant a motion to reopen to consider an application for adjustment of status based on a mar-

riage that occurred after an alien had been placed in removal proceedings)).[5]

The IJ then granted petitioner voluntary departure, and, in the alternative, entered an order of removal. Pet. App. 20a-21a. The IJ noted that if petitioner failed to depart voluntarily, he would be removed. *Ibid.* The IJ expressly stated that if petitioner failed to depart voluntarily, he would be ineligible for adjustment of status for ten years. *Id.* at 21a-22a.

3. Petitioner appealed to the BIA, which had the effect of rendering the IJ's decision (including its grant of permission to depart voluntarily) nonfinal. Pet. App. 5a; see 8 U.S.C. 1101(a)(47)(B)(i) (providing that a removal order "become[s] final" upon affirmance by the BIA or expiration of the time for seeking BIA review); 8 U.S.C. 1229c(b)(1). The BIA affirmed the IJ's denial of a continuance without a separate opinion and dismissed petitioner's appeal. Pet. App. 12a-13a. It then entered an order upholding the IJ's grant of voluntary departure and requiring petitioner to depart within 30 days. *Ibid.*[6] The BIA specifically warned petitioner that

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[5] Petitioner made no attempt to satisfy that burden at his removal hearing; his attorney simply asserted that petitioner believed his new wife "might be pregnant." AR1 217.

[6] The IJ granted petitioner a period of 110 days within which to depart voluntarily. Pet. App. 20a-21a. That was error. In order to receive more than 60 days to depart voluntarily, an alien must request voluntary departure in lieu of or prior to the completion of his removal proceedings. 8 U.S.C. 1229c(a)(1) and (2). An IJ may grant such a request only if, *inter alia*, the alien "[m]akes no additional requests for relief," "[c]oncedes removability," and "[w]aives appeal of all issues." 8 C.F.R. 1240.26(b)(1)(i)(B), (C) and (D). Petitioner did not satisfy those conditions, and he was therefore limited to a maximum departure period of 60 days. See 8 U.S.C. 1229c(b)(2); 8 C.F.R. 1246.26(e). The

if he failed to depart within that time period, he would be subject to civil penalties and would "be ineligible for a period of 10 years for any further relief under" various sections of the INA, including 8 U.S.C. 1255, which addresses adjustment of status. Pet. App. 13a. Petitioner filed a petition for review of the BIA's decision in the court of appeals. *Id.* at 6a.

Petitioner also filed a reconsideration motion with the BIA, which was denied. Pet. App. 5a-6a. Petitioner did not seek a stay of his period of voluntary departure from the BIA. Instead, he sought a stay of his voluntary departure period from the DHS District Director, who denied that request. AR2 182-184.[7]

4. In April 2005, over two years after the BIA affirmed the IJ's decision, petitioner filed a motion to reopen with the BIA in order to pursue adjustment of status because Mohamed's I-130 petition had been approved. Pet. App. 6a; 8 C.F.R. 1245.2(a)(1)(i). The BIA denied the motion to reopen because it was untimely. Pet. App. 9a-10a; see 8 U.S.C. 1229a(a)(7)(C)(i) (providing that a motion to reopen "shall be filed within 90 days of the date of entry of a final administrative order of removal"). The BIA noted the 90-day deadline for motions to reopen and explained that there is "no basis for abrogating the motions deadline" in petitioner's case, both because "[a] DHS processing delay is not a basis for excusing the motion deadline" and because petitioner "is ineligible for the relief sought, adjustment of status,

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IJ's error was harmless, however, because the BIA reduced the voluntary departure period to 30 days. Pet. App. 13a.

[7] After his period of voluntary departure had expired, petitioner again asked the District Director to extend his period of voluntary departure. AR2 187-190. The record does not reflect whether the District Director acted on that motion.

based on his failure to depart under an order of voluntary departure." Pet. App. 10a-11a. Petitioner filed a petition for review of the BIA's decision in the court of appeals, which the court of appeals consolidated with his other pending petition. *Id.* at 6a.

Petitioner also again filed a motion for reconsideration of the BIA's decision, which was denied. Pet. App. 7a.

5. In an unpublished, nonprecedential opinion, the court of appeals denied the consolidated petition for review. Pet. App. 1a-8a. As relevant here, the court of appeals determined that it lacked jurisdiction under 8 U.S.C. 1252(a)(2)(B)(ii) to review petitioner's contention that the IJ abused his discretion in denying petitioner a continuance. Pet. App. 7a-8a. The court relied on its prior decision in *Ali* v. *Gonzales*, 502 F.3d 659, 663-664 (7th Cir. 2007), cert. denied, 128 S. Ct. 1870 (2008), where it had held that it lacked jurisdiction to review an IJ's denial of a continuance under 8 U.S.C. 1252(a)(2)(B)(ii) because, although "the INA is silent on the subject of continuances," "the immigration judge's *authority* to conduct and control the course of removal proceedings is 'specified in' subchapter II of the INA, and this necessarily encompasses the discretion to continue the proceedings." Pet. App. 8a. The court of appeals also rejected petitioner's remaining contentions, which included an argument that the existence of a few "indiscernible" notations in the transcript of his removal hearing violated his due process rights, stating that they were "without merit." *Ibid.*

ARGUMENT

1. Petitioner seeks review of the court of appeals' determination that 8 U.S.C. 1252(a)(2)(B)(ii) precluded it from reviewing the IJ's denial of his request to continue his removal proceedings. Pet. i. The courts of appeals have divided on that question, but review would be premature at this time. Moreover, this case is not a suitable vehicle for addressing the existing tensions in lower court authority. Because petitioner is removable, because he could not show that the IJ abused his discretion in denying a continuance, and because the BIA held that he is ineligible for adjustment of status in any event, petitioner cannot ultimately succeed on the merits of his challenge to the removal order. This Court has denied petitions for certiorari raising the same issue in similar postures in the past. See *Gulati* v. *Mukasey*, 128 S. Ct. 1877 (2008) (No. 07-1005); *Ali* v. *Mukasey*, 128 S. Ct. 1870 (2008) (No. 07-798). There is no justification for a different outcome here.

a. The federal courts of appeals are in conflict regarding whether they have jurisdiction under the INA to review an IJ's denial of a continuance. In the decision below, the Seventh Circuit held, consistent with its prior decision in *Ali* v. *Gonzales*, 502 F.3d 659 (2007), cert. denied, 128 S. Ct. 1870 (2008), that 8 U.S.C. 1252(a)(2)(B)(ii) precludes review of an IJ's discretionary decision to deny a request for a continuance in removal proceedings. See Pet. App. 8a. The Eighth and Tenth Circuits have agreed. See *Yerkovich* v. *Ashcroft*, 381 F.3d 990, 993 (10th Cir. 2004); *Onyinkwa* v. *Ashcroft*, 376 F.3d 797, 799 (8th Cir. 2004). Those courts have reasoned that an IJ's decision to grant or deny a request for a continuance is a "decision or action * * * the authority for which is specified under" the relevant

subchapter of the INA (8 U.S.C. 1151-1381), 8 U.S.C. 1252(a)(2)(B)(ii), because it derives from regulations that the Attorney General promulgated to implement 8 U.S.C. 1229a(a) and (b). Those are the statutory provisions authorizing IJs to conduct removal proceedings, and that in turn specify that the power to grant continuances is within the discretion of IJs. *Ali*, 502 F.3d at 663-664; *Yerkovich*, 381 F.3d at 993; *Onyinkwa*, 376 F.3d at 799.

The majority of circuit courts have reached a contrary conclusion. The First, Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits have all concluded that a decision by an IJ to grant or deny a continuance is not a decision "the authority for which is specified" under the relevant subchapter of the INA "to be in the discretion of the Attorney General," 8 U.S.C. 1252(a)(2)(B)(ii), because an IJ's discretionary authority to act on a motion for a continuance is specified in a regulation, not a statutory provision within the relevant subchapter itself. See *Sandoval-Luna* v. *Mukasey*, 526 F.3d 1243, 1246-1247 (9th Cir. 2008); *Lendo* v. *Gonzales*, 493 F.3d 439, 441 n.1 (4th Cir. 2007); *Alsamhouri* v. *Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007); *Zafar* v. *United States Att'y Gen.*, 461 F.3d 1357, 1360 (11th Cir. 2006); *Khan* v. *Attorney Gen. of the United States*, 448 F.3d 226, 232-233 (3d Cir. 2006); *Ahmed* v. *Gonzales*, 447 F.3d 433, 436-437 (5th Cir. 2006)[8]; *Sanusi* v. *Gonzales*, 445 F.3d 193, 198-199 & n.8 (2d Cir. 2006) (per curiam). The Sixth Circuit has reached the same result

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[8] Petitioner also cites (Pet. 21) *Zhao* v. *Gonzales*, 404 F.3d 295 (5th Cir. 2005), but that case is inapposite, because it concerns the court of appeals' jurisdiction to review the BIA's denial of a motion to reopen, not the court of appeals' jurisdiction to review an IJ's denial of a motion for a continuance.

through a different analysis, concluding that "Section 1252(a)(2)(B)(ii) only applies to the portions of subchapter II left to the Attorney General's discretion, not the portions of subchapter II that leave discretion with IJs in matters where IJs are merit decision-makers that are subject to [the courts of appeals'] review." *Abu-Khaliel* v. *Gonzales*, 436 F.3d 627, 632, 634 (2006).

b. As the government concluded over a year ago, after reexamining its prior position on the issue, the majority position represents the better reading of the statute. See generally Gov't C.A. Br., *Alsamhouri*, *supra*, discussed at p. 14, *infra*. The relevant statutory text requires that the "authority" for the "decision or action" at issue—here, the denial of a continuance—be "specified under this subchapter [Subchapter II of Chapter 12 of Title 8] to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii). Nothing in the relevant statutory "subchapter," however, mentions continuances, or "specifie[s]" that they may be granted "in the discretion of the Attorney General." Rather, an IJ's authority to continue a case derives from regulations promulgated to implement statutory provisions that broadly authorize IJs to conduct removal hearings, but do not specifically authorize them to grant or deny continuances. See, *e.g.*, 8 U.S.C. 1229a(a)(1). Given the general presumption in favor of judicial review, *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001), and the terms of Section 1252(a)(2)(B)(ii), the government agrees with the majority of circuit courts that an IJ's discretionary decision to deny a continuance is not covered by the jurisdictional bar in 8 U.S.C. 1252(a)(2)(B)(ii). The government did not argue otherwise to the court below. See Gov't C.A. Br. 17 n.8.

c. As discussed above, the courts of appeals are divided with respect to the first question upon which petitioner seeks review. This Court's review is not warranted at this time, because the conflict in lower-court authority may well resolve itself without this Court's intervention, and because the issue concerns a narrow issue of unreviewability that is unlikely to affect the outcome of many cases.

Prior to December 2006, the government had taken the position that 8 U.S.C. 1252(a)(2)(B)(ii) precludes federal-court review of an IJ's denial of a continuance. In December 2006, in response to a petition for rehearing in *Alsamhouri* v. *Gonzales*, the government reconsidered its position and concluded that the view of the majority of courts is correct. See Gov't C.A. Br. 7-13, *Alsamhouri*, *supra*. In *Alsamhouri*, the First Circuit initially had held that it "ha[d] no jurisdiction over whether the denial of a continuance was an abuse of discretion." 458 F.3d 15, 16 (2006), withdrawn on petition for reh'g, 471 F.3d 209, 210 (2006). In response to the government's change in position, the First Circuit reversed course, "adopt[ed] the majority rule," and held that it "ha[d] jurisdiction to review a denial of a continuance." 484 F.3d at 122. The Eighth Circuit, which has also adopted the minority position, has suggested that it may well reconsider its holding in light of the government's recent change in position. See *Ikenokwalu-White* v. *Gonzales*, 495 F.3d 919, 924 n.2 (2007) (suggesting that "it may be appropriate for our court to revisit this issue en banc," but noting that the "present case is [not] the most appropriate vehicle for doing so").

In *Ali*, the Seventh Circuit acknowledged the Attorney General's recent change in position, but stated that it "disagree[d]" with the Attorney General's view. 502

F.3d at 660. The opinion further stated that it had "been circulated among all judges of th[at] Court in regular active service" and that "[a] majority did not favor rehearing en banc on the question of whether the jurisdiction-stripping provision, 8 U.S.C. § 1252(a)(2)(B)(ii), applies to continuance decisions of immigration judges"; the opinion also noted, however, that four judges had voted to rehear the case en banc. *Id.* at 661 n.1.

Other developments in the Seventh Circuit since the issuance of the decision below suggest, however, that the court may be willing to revisit the question presented en banc. In December 2007, the Seventh Circuit issued an order directing the government to respond to a petition for rehearing en banc in *Potdar* v. *Keisler*, 505 F.3d 680 (2007). The threshold question raised by that petition is whether the panel erred in concluding that "it lacked jurisdiction under * * * [8 U.S.C.] 1252(a)(2)(B)(ii) to review a denial of a continuance requested by [the alien] to enable him to pursue an application for adjustment of status." Pet. App. 65a. In February 2008, the government filed a response, in which it urged en banc rehearing on that threshold question. Pet. 20; Pet. App. 88a-92a.[9] In June 2008, the court granted panel rehearing in *Potdar* on the question "whether, in this case, this court has jurisdiction to review the BIA's order concerning the motion to reopen because this case falls within the

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[9] The government's response also noted that there is a factual question in *Potdar* about whether the motion the IJ denied actually was a motion for a continuance. The government argued that, in its view, the panel erred in treating the alien's motion to terminate exclusion proceedings as a motion for a continuance, Pet. App. 85a-87a, but suggested that, if the court of appeals declines to revisit that issue, it should grant rehearing en banc on the question whether it has jurisdiction to review a continuance denial, *id.* at 88a-92a.

exception to *Ali* v. *Gonzales*, 502 F.3d 659 (7th Cir. 2007) set forth in *Subhan* v. *Ashcroft*, 383 F.3d 591 (7th Cir. 2004)." 532 F.3d at 939.[10] Supplemental briefing is now underway and should be completed in October or November 2008.

As petitioner himself recognizes (Pet. 1, 22), the court's decision to grant rehearing in *Potdar* suggests that the jurisdictional issue is still in flux in the Seventh Circuit. Although the court granted panel rehearing on a more narrow basis than that urged by the government, the court may still grant rehearing en banc in *Potdar* or in another case. That is especially true because four judges of the court of appeals have recently reiterated their view that the court should revisit en banc the question whether it has jurisdiction to review continuance denials under 8 U.S.C. 1252(a)(2)(B)(ii). See *Kucana* v. *Mukasey*, 533 F.3d 534, 541-542 (7th Cir. 2008) (Ripple, J., dissenting from denial of rehearing en banc); see also *Ali*, 502 F.3d at 661 n.1. It would thus be prudent for this Court to decline to resolve the disagreement in the circuit courts at this time.[11]

There is, moreover, no pressing need for review by this Court, because the issue concerns a narrow aspect of judicial review in the courts of appeals affecting only

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[10] In *Subhan*, the court held that it retained jurisdiction to review a continuance denial where "the denial of a continuance effectively nullified the statutory opportunity to adjust status" and the IJ failed to give a reason consistent with the adjustment of status statute. *Ali*, 502 F.3d at 662-663 (citing *Subhan*, 383 F.3d at 593-594).

[11] The Court should not, as petitioner suggests (Pet. 22), hold the petition pending the Seventh Circuit's ultimate resolution of *Potdar*, because petitioner's claim that the IJ abused his discretion lacks merit and because petitioner likely cannot obtain adjustment of status in any event. See pp. 17-22, *supra*.

one procedural aspect of the conduct of removal proceedings. The IJ's denial of a motion for a continuance is reviewable by the BIA only for abuse of discretion and requires a showing of substantial prejudice. The scope of any judicial review would be at least as deferential. The question whether such judicial review is available therefore is likely to affect the outcome of very few cases, as this case amply demonstrates: The IJ manifestly did not abuse his discretion in denying a motion for a continuance here. See pp. 17-19, *infra*. Nor is this case unusual in that respect: In fact, *all* of the previously cited decisions that found judicial review authorized, see pp. 11-13, *supra*; see also Pet. 20-21, *also* concluded that the denial of the alien's request for a continuance did not constitute grounds for overturning the IJ's decision. See *Sandoval-Luna*, 526 F.3d at 1247; *Lendo*, 493 F.3d at 442; *Alsamhouri*, 484 F.3d at 122; *Zafar*, 461 F.3d at 1362; *Khan*, 448 F.3d at 235; *Ahmed*, 447 F.3d at 438; *Sanusi*, 445 F.3d at 200; *Abu-Khaliel*, 436 F.3d at 634. Review therefore is not warranted at this time.

d. Even if the issue were presently ripe for and warranted this Court's review, this case would be an unsuitable vehicle for resolving it.

First, the claim upon which petitioner sought to obtain review in the court of appeals—that the IJ abused his discretion in denying petitioner's request for a continuance—is meritless. An IJ's continuance denial should be upheld "unless it was made without a rational explanation, it inexplicably departed from established policies, or it rested on an impermissible basis, *e.g.*, invidious discrimination against a particular race or group." *Cordoba-Chaves* v. *INS*, 946 F.2d 1244, 1246 (7th Cir. 1991).

Here, the IJ found that petitioner was removable as charged. Pet. App. 4a. Petitioner has no entitlement to stay in this country illegally. *E.g.*, *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978). The IJ provided sufficient explanation for his decision to deny petitioner's request for a further continuance. The IJ had already granted petitioner a continuance of more than six months to permit adjudication of the visa petition based on his first marriage. AR1 215-216. Petitioner then divorced and remarried only twelve days before his continued hearing. *Ibid.* The new relative visa petition was filed only one week before the hearing. Pet. App. 4a. As the IJ noted, there was no significant possibility that petitioner would become eligible for adjustment of status anytime soon, because not only did petitioner lack an approved relative visa petition, but the new relative visa petition had just been filed, and it was not likely the petition would be granted because petitioner bore the heavy burden of proving that his marriage was *bona fide*, a burden he did not attempt to satisfy at his hearing. See AR1 217; Pet. App. 19a-20a (citing *In re Arthur*, 20 I. & N. Dec. 475 (B.I.A. 1992)).[12] Moreover, even if the relative visa peti-

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[12] In 2002, the BIA modified its holding in *Arthur* in *In re Velarde-Pacheco*, 23 I. & N. Dec. 253 (B.I.A. 2002). Although the IJ cited only *Arthur*, and not *Velarde-Pacheco*, that omission provides no basis for second-guessing the IJ's continuance denial here, because both *Arthur* and *Velarde-Pacheco* hold that an alien who marries after being placed in removal proceedings has the "heavy burden" of proving his marriage was not fraudulent. *Arthur*, 20 I. & N. Dec. at 479; see *Velarde-Pacheco*, 23 I. & N. Dec. at 256 (alien must provide, *inter alia*, "clear and convincing evidence indicating a strong likelihood that [his] marriage is bona fide"). In any event, there is no doubt that both the IJ and the BIA considered *Velarde-Pacheco*, because counsel for the government pointed the case out to the IJ at petitioner's removal hearing, AR1

tion were granted, petitioner would not have been immediately eligible for a visa, because Mohamed was a lawful permanent resident, not a U.S. citizen, at that time. See Gov't C.A. Br. 18 n.10. The IJ considered all of those circumstances and determined that a continuance was not warranted. AR1 215-220; Pet. App. 19a-21a.[13] Because the IJ gave a rational explanation for his refusal to grant a continuance, there was no abuse of discretion.

Second, the BIA held in its decision denying petitioner's untimely motion to reopen that he is statutorily ineligible to obtain the ultimate relief he seeks—adjustment of status—because he has overstayed his period of voluntary departure. Pet. App. 10a-11a. In proceedings before the administrative agency, petitioner requested voluntary departure in lieu of removal, and the BIA ultimately granted him 30 days within which to depart the United States voluntarily. *Id.* at 12a-13a. Both the IJ and the BIA specifically warned petitioner of the consequences of failing to comply with his voluntary departure order, including the consequence that he would be ineligible to seek discretionary adjustment of status for a period of ten years. *Id.* at 13a, 21a-22a.[14] Petitioner

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209, and the BIA referred to the case in denying petitioner's motion for reconsideration, AR1 2.

[13] Petitioner suggests (Pet. 8) that a continuance was also warranted to permit him to further investigate whether his student visa petition was pending. The IJ did not abuse his discretion in denying the continuance on that basis, however. The IJ had already determined at a prior hearing that petitioner was removable as charged because petitioner admitted that his student visa application had never been approved. AR1 201-203, 207.

[14] Petitioner never obtained a stay of voluntary departure. See p. 9 & note 7, *supra*. Although petitioner received a stay of removal from the court of appeals, Pet. App. 6a, he never sought a stay of his period of voluntary departure from that court. See *Alimi* v. *Ashcroft*, 391 F.3d

has nonetheless failed to depart the United States voluntarily.

In denying his motion to reopen, the BIA determined that petitioner is statutorily ineligible for adjustment of status because he failed to depart voluntarily. Pet. App. 10a-11a; see 8 U.S.C. 1229c(d)(1)(B); 8 C.F.R. 1240.26(a) (same); see also *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2310 (2008) ("[f]ailure to depart within the prescribed [voluntary departure time] renders the alien ineligible for certain forms of relief, including adjustment of status, for a period of 10 years").[15] Petitioner never challenged that finding before the agency. Instead, he suggested for the first time in his reply brief in the court of appeals that he could escape the consequences of his failure to depart because he did not post a voluntary departure bond. Pet. C.A. Reply Br. 17. Petitioner relied on *In re Diaz-Ruacho*, 24 I. & N. Dec. 47, 47 (B.I.A. 2006), in which the BIA held that "an alien who fails to meet the voluntary departure bond requirement is not subject to the penalties of [8 U.S.C. 1229c(d)]." See Pet. C.A. Reply Br. 17.[16]

888, 892-893 (7th Cir. 2004) (court of appeals stay order does not also stay the period of voluntary departure where the alien did not expressly ask for such relief); see also Br. in Opp. at 20-24, *Gulati*, *supra* (noting that there is a serious question whether a federal court has the authority to stay the expiration of a period of voluntary departure).

[15] In *Dada*, this Court held that an "alien must be permitted an opportunity to withdraw [a] motion for voluntary departure, provided the request is made before the departure period expires." 128 S. Ct. at 2311. That holding has no impact on this case, because petitioner never sought to withdraw his motion for voluntary departure. See Pet. App. 10a-13a.

[16] The Department of Justice has proposed an amendment to the relevant regulation that would prospectively abrogate the holding of *Diaz-Ruacho*. See Executive Office for Immigration Review, Dep't of

Because petitioner did not raise the question whether his failure to post a voluntary departure bond relieves him of the penalties for failing to depart before the BIA, he failed to exhaust his administrative remedies on the claim, and a reviewing court is therefore without jurisdiction to consider it. See 8 U.S.C. 1252(d)(1). That rule is especially apt here, because the question whether petitioner posted a voluntary departure bond is precisely the type of factual determination entrusted to the agency in the first instance. Moreover, the court of appeals apparently rejected the claim, see Pet. App. 8a (finding "without merit" other matters raised by petitioner) and petitioner does not renew the claim that he is not subject to the voluntary departure penalties in his petition.

In any event, even if petitioner were not barred by statute from obtaining adjustment of status, it is highly unlikely that the agency would determine that he merits a favorable exercise of discretion and permit him to adjust his status in light of his manipulation of the voluntary departure rules. Petitioner told the IJ that he was willing to depart voluntarily, and he did not bring his alleged failure to file a voluntary departure bond to the IJ's or BIA's attention, instead making a last-minute plea to the court of appeals to relieve him of an obligation he willingly undertook. See, *e.g.*, *Patel*, 17 I. & N. Dec. at 601-602 ("An applicant has the burden of showing that discretion should be exercised in his favor," and "where adverse factors are present, it may be necessary for the applicant to offset those factors by a showing of unusual or even outstanding equities.").

Justice, *Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review*, 72 Fed. Reg. 67,674, 67,683-67,684, 67,686 (2007) (proposing amendment to 8 C.F.R. 1240.26(c)(3)).

Because petitioner likely cannot obtain the underlying relief that he seeks, his case is not a suitable vehicle for resolving the question whether 8 U.S.C. 1252(a)(2)(B)(ii) precludes judicial review of the denial of a continuance. Further review is therefore unwarranted.[17]

2. Petitioner also contends (Pet. 31-37) that his due process rights were violated due to some indiscernible notations in the transcript of his removal hearing. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of another court of appeals or of this Court. Further review of petitioner's fact-bound claim is therefore unwarranted.

The court of appeals correctly rejected petitioner's claim that eleven notations of "indiscernible" in the approximately 40-page transcript of his removal proceedings violated his due process rights. As an initial matter, petitioner has no constitutionally protected liberty interest in discretionary immigration relief such as an adjustment of status. See, *e.g.*, *Jupiter* v. *Ashcroft*, 396 F.3d 487, 492 (1st Cir.), cert. denied, 546 U.S. 938 (2005); *Tovar-Landin* v. *Ashcroft*, 361 F.3d 1164, 1166-1167 (9th Cir. 2004); *Mireles-Valdez* v. *Ashcroft*, 349 F.3d 213, 219 (5th Cir. 2003); *Nativi-Gomez* v. *Ashcroft*, 344 F.3d 805, 809 (8th Cir. 2003). To the extent that petitioner has a liberty interest in avoiding removal from the United States, that liberty interest was accorded constitution-

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[17] Petitioner suggests in passing (Pet. i, 2-3) that, if 8 U.S.C. 1252(a)(2)(B)(ii) bars judicial review of discretionary denials of continuances generally, the court of appeals nonetheless had jurisdiction over his claim under 8 U.S.C. 1252(a)(2)(D) because he presented a constitutional claim or question of law. Petitioner did not present argument on that issue in his petition, nor did he present that issue to the court of appeals.

ally adequate due process because petitioner was afforded notice and an opportunity to contest the charge of removability. Petitioner had a hearing before an IJ, who permitted him to present evidence and arguments, and then concluded that petitioner was removable as charged. AR1 197-223; Pet. App. 19a. Petitioner claimed that he was not removable because he had a pending student visa application, but he never produced any evidence of that application, and he acknowledged to the IJ that the application had never been approved. AR1 201-203. (As it turns out, petitioner had abandoned that application, and it had been denied prior to his removal hearing. See p. 6 n.3, *supra*.) The BIA, like the IJ, determined that petitioner was removable as charged. Pet. App. 12a-13a. Petitioner therefore received the process he was due.

Petitioner is mistaken in suggesting (Pet. 35) that the eleven "indiscernible" notations in the lengthy transcript deprived him of a "meaningful opportunity to be heard." It is well-established that "[a]n error in the record or transcript does not by itself present a due process violation." *Sterkaj* v. *Gonzales*, 439 F.3d 273, 279 n.2 (6th Cir. 2006); see *Kheireddine* v. *Gonzales*, 427 F.3d 80, 85-86 (1st Cir. 2005) ("a mere failure of transcription, by itself, does not rise to a due process violation"). That is especially true here, where only *one* "indiscernible" notation occurred in actual testimony, AR1 203,[18] and petitioner was able to present his argument that (in his view) he was not removable because he had a pending student visa application, AR1 201-203.

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[18] All of the other "indiscernible" notations were in statements made either by petitioner's counsel, see AR1 201, 207, 216, 217, 220, by government counsel, see AR1 209, or by the IJ, see AR1 215, not by petitioner or a witness.

Further, petitioner has not established prejudice. "A litigant who seeks reversal on the ground of a denial of due process that is due to an inaccurate or incomplete transcript is * * * required to make the best feasible showing he can that a complete and accurate transcript would have changed the outcome of the case." *Ortiz-Salas* v. *INS*, 992 F.2d 105, 106 (7th Cir. 1993); see *Kuschchak* v. *Ashcroft*, 366 F.3d 597, 602 (7th Cir. 2004) (alien must offer "concrete evidence indicating that the due process violation had the potential for affecting the outcome of the hearing" (internal quotation marks omitted)). Petitioner has not described what evidence or argument was obscured by eleven "indiscernible" notations in the lengthy transcript, let alone explain how such evidence "would have changed the outcome of the case." *Ortiz-Salas*, 992 F.2d at 107. His conclusory affidavit, Pet. App. 107a-116a, which was not submitted to the BIA,[19] stated only that he wished to present additional evidence to show that he submitted a student visa application, *id.* at 113a. But petitioner acknowledged that the application was never approved, AR1 203, and thus he cannot show that the outcome would have been different had he presented that additional evidence. The court of appeals therefore correctly rejected his claim. See, *e.g.*, *Ortiz-Salas*, 992 F.2d at 106-107 (rejecting alien's due process claim, despite 292 errors in transcript, when alien "made no effort to show that the testimony that was not transcribed was material"); *In re*

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[19] Petitioner submitted the affidavit to the court of appeals in July 2004, as an attachment to his reply brief in support of his motion for a stay of removal. See *Al Marbu* v. *Mukasey*, No. 04-2055 (7th Cir.). Petitioner submitted a similar but shorter affidavit to the BIA, but not until April 2004, when he filed a motion for a stay of removal. See AR1 18-20.

Stapleton, 15 I. & N. Dec. 469, 470 (B.I.A. 1975) (incomplete transcript did not constitute due process violation where the alien failed to show prejudice).

Petitioner asserts in passing (Pet. 33) that there is disagreement in the circuits regarding the legal standard for finding a due process violation based on an inadequate transcript. He is mistaken. Petitioner cites (*ibid.*) only one case in support of the alleged circuit split, *Silva-Calderon* v. *Ashcroft*, 371 F.3d 1135, 1137 (9th Cir. 2004), where the court of appeals expressly "decline[d] * * * to weigh in on the merits of [the alien's] due process claims." That case did not address the due process standard, nor did it mention any disagreement in the circuits. Petitioner has not otherwise explained how there is any disagreement in the circuits, and the cases he cites belie that proposition.

Finally, petitioner suggests (Pet. 31-33) that reversal is warranted because his transcript violates the INA, the relevant regulations, and the Court Reporter Act. As an initial matter, those argument were neither presented to nor passed on by the court of appeals, and this Court should not consider them in the first instance. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992). In any event, petitioner is mistaken. The INA provides that an alien has a right to "a complete record * * * of all testimony and evidence produced at the proceeding." 8 U.S.C. 1229a(b)(4)(C). The implementing regulations provide that the contents of the record include "the testimony, exhibits, applications, proffers, and requests, the immigration judge's decision, and all written orders, motions, appeals, briefs, and other papers filed in the proceedings," and that "[t]he hearing shall be recorded verbatim except for statements made off the record with the permission of the immigration

judge." 8 C.F.R. 1240.9. Petitioner's transcript meets those requirements; a complete record of proceedings was prepared, and, as explained, there was only one "indiscernible" notation in testimony in forty pages of transcript. See pp. 23-24, *supra*. Petitioner provides no authority supporting his assertion to the contrary, and, in any event, he has not established that he was prejudiced by the "indiscernible" notations. See pp. 24-25, *supra*. Petitioner's claim regarding the Court Reporter Act likewise lacks merit, because that Act applies to *district court* proceedings, not administrative removal proceedings. 28 U.S.C. 753. Further review of petitioner's claims regarding the transcript of his IJ hearing is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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